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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6798

RICHARD HENRY BRYAN,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS

Federal Defender Program, Inc.
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Janet F. Perlman
Attorney for Petitioner
Richard Henry Bryan

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Richard Henry Bryan, respectfully prays for leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53 of the Supreme Court of the United States. This motion is made pursuant to Title 28, United States Code, Section 1915 and Title 18, United States Code, Section 3006A(d)(6).

In support of this motion, Petitioner shows the following:

1) Petitioner is a person for whom counsel was appointed in this case by the United States Magistrate for the Northern District of Georgia pursuant to Title 18, United States Code, Section 3006A;

2) Petitioner is a person for whom counsel was appointed in this case by the United States District Court for the Northern District of Georgia to pursue an appeal to the Fifth Circuit Court of Appeals pursuant to Title 18, United States Code, Section 3006A; and

3) Petitioner remains indigent and has advised counsel in writing, pursuant to Local Rule 7 of the Fifth Circuit Court of Appeals, of his desire that a Petition for Writ of Certiorari be filed.

Respectfully Submitted,

Janet F. Perlman
Attorney for Petitioner
Richard Henry Bryan

OF COUNSEL:

Federal Defender Program, Inc.
101 Marietta Tower, Suite 3612
Atlanta, Georgia 30303

(404) 688-7530

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
IN FORMA PAUPERIS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-titled case on March 23, 1979.

CITATION TO OPINION BELOW

United States v. Bryan, 591 F.2d 1161 (1979).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 23, 1979. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). Petitioner's Motion for Rehearing was denied on May 4, 1979.

QUESTIONS PRESENTED

I. Whether the trial court committed reversible error by wholly disallowing Petitioner's duress/necessity defense to the escape charged, which defense was grounded upon Petitioner being the victim of homosexual assaults while an inmate at the United States Penitentiary in Atlanta, Georgia, and which assaults posed a continuing threat at the time of Petitioner's escape.

II. Whether the trial court committed reversible error in disallowing Petitioner evidence of his state of mind and intent, after the government had "opened the door" and placed in issue Petitioner's state of mind and intent by one witness' testimony of his state of mind and intent and a second witness' testimony that Petitioner had assumed a false name and had burn scabs on each fingertip, which evidence raised the issue, and where the court charged on specific intent as an element to be proved beyond a reasonable doubt.

III. Whether the trial court committed reversible error by refusing to suppress as impeaching evidence, pursuant to Rule 609(a) of the Federal Rules of Evidence, this Petitioner's prior escape, bank robbery, voluntary manslaughter and murder convictions and thereby effectively preventing the Petitioner from testifying in his own behalf.

IV. Whether the trial court committed reversible error in charging the jury to consider the extent to which the testimony of witnesses was supported or contradicted by each other when the Petitioner did not testify himself and did not put on any evidence in the case.

V. Whether the trial court committed reversible error by denying Petitioner's Motion for Mistrial when the government's witness testified to Petitioner's post arrest silence, which testimony violated Petitioner's constitutional right to remain silent as guaranteed by the Fifth Amendment and which testimony so prejudiced Petitioner as to violate due process of law.

STATEMENT OF THE CASE

This criminal action was brought under a one-count indictment charging the Petitioner, Richard Henry Bryan, with unlawfully escaping on July 10, 1976 from Georgia Baptist Hospital in Atlanta, Georgia, where Petitioner had been transferred for medical treatment on or about July 6, 1976 while committed to the custody of the Attorney General, in violation of Title 18, United States Code, Section 751(a). (R. Vol. I, p. 1). Petitioner pled not guilty to the indictment at his arraignment hearing on March 2, 1978. (R. Vol. I, p. 3).

Petitioner sought to present a duress/necessity defense to the escape charged, said defense based on Petitioner's fear of homosexual attacks perpetrated upon him at the United States Penitentiary in Atlanta, Georgia. (R. Vol. I, p. 47-54, 67-73). Petitioner procured, pursuant to Rule 17(b) of the Federal Rules

of Criminal Procedure, subpoenas and subpoenas duces tecum upon various individuals in support of the duress/necessity defense. (R. Vol. I, p. 44-45). Petitioner also presented to the Honorable William C. O'Kelley, United States District Court Judge for the Northern District of Georgia, numerous writs of habeas corpus ad testificandum to procure the presence of witnesses who were incarcerated in federal institutions and who were necessary to support such a defense. At the court's request (R. Vol. I, p. 47, 82), Petitioner filed a brief concerning the duress or necessity defense, the purpose of which was to present to the district court the evidence and authority supporting his defense in order to procure these necessary witnesses. (R. Vol. I, p. 47-54).

Thereafter, and in response to Petitioner's brief concerning the duress or necessity defense, the government filed a motion to quash subpoenas and to disallow Petitioner's defense of duress or necessity. (R. Vol. I, p. 60-66). Petitioner then filed his formal offer of proof with respect to Petitioner's duress defense. (R. Vol. I, p. 67-73). Judge O'Kelley granted the government's motion and disallowed Petitioner's duress or necessity defense. (R. Vol. I, p. 82-85).

The case came on for trial before a jury before the Honorable William C. O'Kelley in the United States District Court for the Northern District of Georgia on June 5, 1978 and June 6, 1978. (R. Vol. II, p. 2, 4). Petitioner was found guilty by the jury. (R. Vol. I, p. 87; Vol. II, p. 215). On July 21, 1978, Petitioner was sentenced by Judge O'Kelley for a period of five (5) years, said sentence to commence upon the expiration of, or the legal release from, the federal sentence the Petitioner is now serving. (R. Vol. I, p. 88).

A Notice of Appeal was filed on behalf of Petitioner on July 27, 1978, and the court entered an order allowing the appeal to proceed in forma pauperis. (R. Vol. I, p. 89). The Fifth Circuit affirmed the conviction.

Petitioner's theory of the case was grounded solely on his proposed defense that his escape was a direct result of Petitioner's fear of being returned to the Atlanta Federal Penitentiary where he had been repeatedly and seriously homosexually attacked by other inmates. Such attacks were a continuing threat to Petitioner if he returned to the Atlanta Penitentiary.

In attempting to procure the attendance of necessary witnesses for Petitioner's duress or necessity defense, Petitioner, as directed by the trial court, submitted a specific, written offer of proof (R. Vol. I, p. 67-73) which set out in detail the evidence Petitioner expected to produce with respect to his defense. Petitioner's offer of proof would have produced evidence tending to prove that Petitioner was faced with specific threats of forcible sexual attacks and possibly substantial bodily injury in the immediate future. These assaults could be verified by eye witness testimony to the assaults and testimony of admissions made by the assaulting inmates making it clear that such assaults would continue. Petitioner's evidence would show that the prison authorities were generally unable and unwilling to control homosexual assaults at the Atlanta Penitentiary and that Petitioner's specific complaint to a guard resulted in his being advised that he should arm himself with a knife to fend off such attacks. Petitioner would show that in his circumstances court action was not a viable alternative because of the delays inherent in administrative exhaustion, and such administrative procedures dictate placement in administrative detention with the concommitant certainty of retaliation.

And lastly, Petitioner would show that at the time of his departure from the hospital he fully expected to be returned to the United States Penitentiary in Atlanta as soon as his medical treatment was completed and would further show that upon being arrested some six (6) months later, he was immediately returned to the United States Penitentiary in Atlanta. Petitioner knew that upon his arrest or his turning himself in, he would be immediately returned to the Atlanta Penitentiary. Because of his knowledge that he would be returned there, Petitioner did not turn himself in.

On December 30, 1976, Petitioner was taken into federal custody in Chatsworth, Georgia as an escapee. (R. Vol. II, p. 144, 152-153), and as he knew would happen, Petitioner was immediately returned to the United States Penitentiary in Atlanta on January 4, 1977. (R. Vol. II, p. 142).

The trial court disallowed Petitioner the opportunity to present his sole defense, rejecting the duress/necessity defense as a matter of law. (R. Vol. I, p. 82-85). As the trial proceeded, the government, during its case-in-chief called Brenda Tomason who testified as to statements made by the Petitioner concerning Petitioner's plans for escape. Through these statements, the government thus elicited testimony describing Petitioner's state of mind, presumably offered to satisfy the government's burden of proving that Petitioner's escape was done willfully and with the specific intent to do something the law forbids, that is with bad purpose either to disobey or disregard the law, which elements were charged to the jury (R. Vol. II, p. 208-209), went unobjected to by the government (R. Vol. II, p. 211), and which therefore became the law of the case. The government then proceeded with its case-in-chief by calling Harold Poe, a Special Agent with the Federal Bureau of Investigation, to testify that Petitioner told the arresting authorities that his name was Rodney B. Brown. (R. Vol. II, p. 151-153). The government further solicited from Poe that he had noticed something unusual about Petitioner's hands, "on the middle of each finger and each thumb was a scab, a fresh -- it looked like a burn, as if a burn scab, right in the middle of each finger and each thumb". (R. Vol. II, p. 152).

Petitioner then requested permission to put on the evidence previously offered in conjunction with the duress defense, but not on the basis of presenting that defense; rather, that by the introduction of this evidence offered solely for the purpose of showing Petitioner's state of mind, the government had "opened up the door to the question of what was in petitioner's mind, his state of knowledge and intent", (R. Vol. II, p. 156-158), as well as to provide Petitioner an opportunity to explain his statements. (R. Vol. II, p. 169). Petitioner further posited that the government offered the evidence to show Petitioner's "bad intent", "evil intent" in order to satisfy the government's burden on intent and Petitioner sought to present his evidence that his was an innocent intent to evade homosexual attacks. (R. Vol. II, p. 158-159, 169, 208-209). Judge O'Kelley denied Petitioner's motion to present his evidence. (R. Vol. II, p. 159). Thereafter, upon defense counsel's inquiry into why Petitioner could not be called to explain his state of mind at the time of the escape, the court stated:

> I am not prohibiting the defendant from taking the stand. I have never indicated I would prevent him from taking the stand. I refuse to bring these other witnesses you tendered. (R. Vol. II, p. 170).

So, while it is clear that Petitioner himself would be allowed to testify to his state of mind, and explain the statements or admissions which the government introduced, corroborating witnesses on his behalf were disallowed. However, Petitioner was effectively prevented from taking the stand on his behalf because of Judge O'Kelley's denial of his motion to suppress evidence of the Petitioner's prior escape, bank robbery, voluntary manslaughter and murder convictions as impeaching evidence pursuant to Rule 609(a) of the Federal Rules of Evidence. (R. Vol. II, p. 178).

In order to avoid the presentation of any evidence concerning the bank robbery conviction, Petitioner's conviction of that charge was stipulated. (R. Vol. I, p. 10-12, 27-29, 86). Moreover, neither bank robbery, voluntary manslaughter, murder or escape necessarily involve dishonesty in the sense that they necessarily implied a tendency toward falseness or the lack of believability under oath. Nevertheless, Judge O'Kelley ruled that said convictions were probative on the issue of credibility outweighed the potential for unfair prejudice. (R. Vol. II, p. 178-179). As a result of the refusal to suppress said convictions, Petitioner was unable to take the stand, because of the severe prejudicial effect which would have resulted therefrom even with a cautionary instruction.

During Agent Poe's direct government testimony, Petitioner's exercise of his right to remain silent was thrust

before the jury. Agent Poe initially testified that Petitioner would say "nothing". (R. Vol. II, p. 145). Petitioner objected and moved for a mistrial which was denied. (R. Vol. II, p. 145, 149). When the testimony resumed, Agent Poe, despite the court's cautionary instruction (R. Vol. II, p. 150), once again made it clear to the jury that Petitioner did not speak with Poe as requested (R. Vol. II, p. 151-155), thus again high-lighting petitioner's exercise of his right to remain silent.

During the court's general instructions concerning the jury's consideration of the testimony of witnesses, the court instructed the jury that in determining the believability of witnesses, to consider the relation each witness may have to either side and the ". . . extent to which, if at all, each witness is either supported or contradicted by other evidence in the case". (R. Vol. II, p. 206). Petitioner specifically excepted to this instruction on the basis that it "places a burden upon the defendant, an implication that the defendant should have called evidence to contradict what the government said or should have contradicted it in some way; that by not contradicting it, it bolsters the government's case . . ." in a case where the defendant neither puts on any evidence in the case nor takes the stand. (R. Vol. II, p. 212).

REASONS FOR GRANTING WRIT

I. TRIAL COURT'S REFUSAL TO ALLOW PETITIONER'S DURESS/NECESSITY DEFENSE AS A MATTER OF LAW.

Petitioner sought to present a duress defense based on fears of homosexual assaults perpetrated upon him while an inmate at the United States Penitentiary in Atlanta, Georgia. The trial court disallowed the defense holding:

> Because defendant's offer of proof of his defense of alleged duress or necessity fails to include evidence that would explain his absence from custody for a period of six months, his duress defense must be rejected as a matter of law. (R. Vol. I, p. 84).

The trial court's ruling was erroneous in the following respects: (A) Petitioner's duress defense should have been allowed under general duress defense standards and Petitioner's continued absence from custody for six months was a factual issue for the jury to consider in the validity of the defense; (B) Even if the five-pronged standard established in People v. Lovercamp, 483 Ca. App.3d 823, 118 Ca. Rptr. 110 (1974), for the presentation of a duress defense to an escape is appropriate, Petitioner's offer of proof satisfied that test; and (C) Even if the five-pronged standard of Lovercamp is an appropriate standard by which to assess a duress defense in escape cases, it is inappropriate in the case sub judice.

(A) The general defense of duress, coercion or compulsion has long been recognized as a defense in the federal courts to charges of criminal activity. Tomoya Kawakita v. United States, 343 U.S. 717, 735, 72 S.Ct. 950, 961 (1952); United States v. Stiglets, 463 F.2d 242 (5th Cir. 1972).

While the presentation of a duress defense grounded on the fear of homosexual assault has not been specifically addressed in the Fifth Circuit, the propriety of presenting a duress defense to an escape charge has been recognized. See United States v. Chapman, 455 F.2d 746 (5th Cir. 1972); United States v. Davis, 546 F.2d 583 (5th Cir. 1977).

In 1974 and 1975, the Supreme Courts of Michigan and California came down with opinions which sought to establish guidelines for the presentation of a defense of coercion or necessity in a case in which an escaping prisoner contends that his escape was a result of homosexual attacks or the threats of homosexual attacks. In People v. Lovercamp, supra, the court established a five-pronged test for the presentation of a duress defense to an escape:

> 1. The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> 2. There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
>
> 3. There is no time or opportunity to resort to the court;
>
> 4. There is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape; and
>
> 5. The prisoner immediately reports to the proper authorities when he has obtained a position of safety from the immediate threat. At p. 115.

While the Lovercamp test has been adopted by some state supreme courts, as well as by the Ninth Circuit, See, for example, State v. Horn, 566 F.2d 1378 (Hawaii 1977); United States v. Michelson, 559 F.2d 567 (9th Cir. 1977), other courts have declined the opportunity to adopt this test. In Chapman, supra, the availability of the duress defense was judged by the traditional duress defense, not by a separate set of standards as imposed by Lovercamp. In Chapman, supra, defendant claimed that he was forced by threats of great bodily harm made by other prisoners to join in the escape, and that his continued absence after the initial escape was induced by fear of great bodily harm from the jailers where he expected to be returned. In holding that Chapman could present his duress defense, the court noted ". . . Appellant's claim that his continued absence from lawful custody was involuntary depends largely if not entirely upon the jury's assessment of his credibility when he claimed that he had a terror of being brutalized by . . . deputies should he turn himself in". Chapman, supra, at 750. Thus, the fact that he did not immediately report once he achieved a position of safety was a fact issue for the jury to consider upon his validly presented duress defense. In People v. Luther, 394 Mich. 619, 232 NW2d 184 (S.Ct. Mich. 1975), the Supreme Court also refused to adopt the Lovercamp test, noting that while the five conditions there might be "competent evidence" with respect to the defense, the court concluded:

> A Defendant successfully raises the defense of duress when he presents evidence, as here, from which a jury could conclude:
>
> (A) the threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> (B) the conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> (C) the the fear of duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> (D) the defendant committed the act to avoid the threatened harm. At p. 187.

The court held the duress defense, when evidencing the above elements to be "a question for the jury", id at 186-187, and evidence of failure to immediately report, as probative evidence with respect to elements (C) and (D). This analysis has been employed by other state courts, who rely on the traditional notions of duress rather than placing specific conditions on the defense in an escape case. See, e.g., Pittman v. Commonwealth, 512 SW2d 488 (Ky. App. 1974).

Petitioner's offer of proof clearly satisifies the four-pronged test of Luther, such being nothing more than the traditional requirements of a duress defense. And, as in United States v. Chapman, supra, at 750, Appellant's continued absence from lawful custody was a fact for the jury to consider as to the properly presented defense and is not a legal matter to be used to deny Petitioner's presentation of his defense as was done here. The five-pronged test established in Lovercamp is, therefore, an inappropriate standard by which to judge Petitioner's proposed duress defense.

(B) Even if the five-pronged standard established by People v. Lovercamp, supra; United States v. Michelson, supra, is an appropriate test by which Petitioner's proposed duress defense should have been judged, Petitioner satisfied those requirements sufficiently enough to authorize its presentation.

Lovercamp requires a defendant to immediately report only when he has "attained a position of safety from the immediate threat". Id, at p. 115. Petitioner's offer of proof (R. Vol. I, p. 47-53, 67-73) evidenced that if he complained of the assaults, he would be placed in administrative detention where sexual assaults also occurred and where the assaulter is also housed pending a hearing on Petitioner's complaint (R. Vol. I, p. 69-71); that at the time he slipped out of the hospital window he knew he would be taken back to the Atlanta Penitentiary where he was facing further assaults (R. Vol. I, p. 72); that after his escape Petitioner knew that if he turned himself in he would immediately be sent back to the United States Penitentiary, Atlanta (R. Vol. I, p. 72); that Petitioner did not turn himself in because of his knowledge that he would be sent back to Atlanta; and that Petitioner, arrested six months later, was immediately returned to Atlanta. (R. Vol. I, p. 72; Vol. II, p. 142).

Petitioner asserts that given the fact that he knew he would be immediately returned to the United States Penitentiary in Atlanta upon turning himself in, Petitioner had not as yet attained a position of safety. Since Lovercamp requires Petitioner to immediately report only after obtaining a position of safety from the immediate threat by turning himself in, Petitioner would have defeated the very purpose of his departure, i.e. to avoid further homosexual attacks.

Therefore, Petitioner's offer of proof was sufficient, at least to allow the introduction of evidence concerning the homosexual attacks against him and the submission of the defense to the jury.

(C) Assuming, arguendo, that the five-pronged test of Lovercamp must be met in order to authorize the presentation of the duress defense, the requirement of "immediately reporting" there established is wholly inappropriate in the case sub judice.

The duress defense in escape cases was expressly recognized by the Ninth Circuit in United States v. Michelson, supra. That court imposed, as did Lovercamp, the requirement that the escapee report to proper authorities immediately after attaining a position of safety. Id, at 570. This return requirement is grounded on the theory that the escape in question is a continuing offense as the Michelson court explained:

> Although duress may excuse the inmate's departure it does not absolve his continued absence from custody. In other words, while coercion may shield the escapee from the imposition of additional punishment, it does not commute the sentence previously imposed. Thus, while the Court recognizes the availability of the duress defense to the crime of escape . . . the Court also recognizes that duress exonerates only the departure from custody and not the continued absence. Id, at 570.

However, the notion of a continuing offense is not the only means by which an escape may be effectuated. An escape can be and most often is accomplished at the moment of departure without reference to the subsequent formation of a defendant's intent in failing to return to custody. Where such an escape is sought to be proven, and the notion of a continuing offense is not, it is inappropriate to use the return requirement analysis of the Ninth Circuit in considering the duress defense.

This very issue -- whether or not a jury should be allowed to consider a duress defense in the absence of the one special requirement that an escapee report, has been answered in the affirmative in United States v. Bailey, (Case no. 77-1404, D.C. Circuit Court, decided July 12, 1978). Here the court made clear that this return requirement is grounded on the notion of escape as a continuing offense and that where this theory is not reflected in the indictment or in the trial court's charge to the jury, application of the return requirement is inappropriate.

The Bailey court held that where appellants had been charged with escaping on or about August 26, 1976, a date certain and where the court's instructions, rather than explaining a "continuing offense" concept to the jury, emphasized the notion that the appellant left on August 26, that this was therefore not a case where the jury was considering whether a defendant escaped by failing to return.

> In effect, the trial court denied Appellant's right to have a jury consider duress defense to the crime with which they had been charged (escaping on August 26) because the court found that they would in any event be guilty of an offense under a theory (failure to return) that was never presented either to appellants or to the jury. We cannot sanction such an obvious violation of appellants' constitutional right to jury trial. Id, at 25-26. (Emphasis in original.)

In the case sub judice, Petitioner was charged with escaping on or about July 10, 1976 (R. Vol. I, p. 1), and the court's instructions emphasized that the offense occurred at this time. (R. Vol. II, p. 204, 208). The "continuing offense" concept was not placed before the jury in their instructions and they were not considering whether Petitioner escaped by failing to return. (R. Vol. II, p. 203-211). The court's denial of Petitioner's duress defense was reversible error denying his constitutional right to a jury trial.

II. DENIAL OF PETITIONER'S EVIDENCE WHICH WENT TO INTENT ISSUE AND TO WHICH GOVERNMENT HAD "OPENED THE DOOR".

The government introduced during their case-in-chief, several statements made by Petitioner concerning his plans for escape (R. Vol. II, p. 99-101, 107-108, 110), testimony that

Petitioner was using an alias (R. Vol. II, p. 151-153), and testimony that Petitioner had scabs on each finger and thumb (R. Vol. II, p. 152), thereby "opening the door" to Petitioner's state of mind and intent. When Petitioner sought to introduce evidence to explain the statements and his intent, as raised by the government, the court refused it. (R. Vol. II, p. 159).

It is today universally recognized that the fact of an accused's . . . . concealment, assumption of a false name and related conduct are . . . evidence of consciousness of guilt and thus of guilt itself. United States v. Ballard, 423 F.2d 127, 133 (5th Cir. 1970). In an escape case, evidence such as use of a false name is evidence of an intent not to return to federal custody. United States v. Chapman, supra. When evidence which places in issue Petitioner's state of mind or intent is introduced, Petitioner must then be given an opportunity to present evidence concerning what motivated such conduct and is entitled to a jury charge encompassing such explanation for jury consideration of it. See, United States v. Meyers, 550 F.2d 1036 (5th Cir. 1977).

Having placed in issue Petitioner's state of mind and intent, admission of Petitioner's evidence, being that contained in his offer of proof (R. Vol. I, p. 67-73), was clearly authorized to prevent prejudice. See United States v. Winston, 447 F.2d 1236 (D.C. Cir. 1971). While the trial court has broad discretion when ruling on the relevance of proffered evidence, it is imperative that on any given issue the same standard be applied to both parties. United States v. Parker, 447 F.2d 826 (7th Cir. 1971). Where, as here, the government was given enough latitude to introduce evidence on Petitioner's intent, the court applied a narrower standard to Petitioner's attempt to make a fair response to their assertions. See Parker, id, at 832.

The court instructed the jury that Petitioner was charged with a willful escape. (R. Vol. II, p. 208). These instructions went unobjected to (R. Vol. II, p. 211) and thus specific intent became a necessary element for conviction pursuant to the law of the case doctrine. United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976). In recognition of this, the prosecution offered its evidence to carry its burden in proving the requisite intent. Although Petitionre's specific intent being placed in issue mandates that he be allowed to present his evidence on his intent, the court denied Petitioner's motion to present such evidence. (R. Vol. II, p. 159, 169, 170). This refusal denied Petitioner highly relevant testimony on an element of the offense and denied Petitioner's constitutional rights to due process of law and a fair trial and his right to a jury trial.

III. FAILURE TO SUPPRESS CONVICTIONS OF DEFENDANT

The most crucial issue in this case was the Petitioner's state of mind and intent in escaping. Although Petitioner's testimony on this point would have been the most direct, Petitioner was in effect prevented from taking the stand in his own defense by the refusal of Judge O'Kelley to suppress the Petitioner's prior bank robbery, manslaughter, murder and escape convictions. (R. Vol. II, p. 178). The trial court, pursuant to Rule 609 of the Federal Rules of Evidence, ruled that such convictions would be admissible, if offered, solely for the purpose of "attacking the credibility of a witness". However, Rule 609(a) goes on to provide that even if a conviction is offered for the limited purpose of challenging credibility it must either be a conviction involving "dishonesty or false statement" or be a felony conviction concerning which the court has determined that the probative value of admitting the conviction outweighs the unfair prejudicial effect to the defendant. We are here concerned with the second test laid out in Rule 609(a), where if the conviction does not necessarily involve dishonesty or false statement, then the court must specifically find that its probative value on the issue of credibility outweights the potential for unfair prejudice.

Only convictions which clearly involve "dishonesty or false statement" will be automatically admissible against the defendant. United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976);

United States v. Jackson, 405 F.Supp. 938 (E.D.N.Y. 1975). Clearly, neither bank robbery, manslaughter nor escape involves false statement or "dishonesty" as that word was intended by Congress. As stated in the Conference Committee Report:

> By the phrase "dishonesty and false statement" the Conference means crime such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. U. S. Code Cong. Admin. News, pp. 7098, 7103.

Thus, Rule 609(a)(2) would not authorize the admission of those convictions. The question then becomes whether or not the convictions are admissible under the other prong of 609(a)(1) as felonies for which the court has determined that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant.

It must be remembered that the convictions are being offered solely on the issue of the truthfulness of Petitioner's testimony. There is not a single element of any of these convictions which require any showing or lack of truthfulness in the Petitioner. A conviction for an assaultive crime such as manslaughter does not prove that the Petitioner is dishonest, United States v. Jackson, supra, nor does a robbery conviction necessarily show dishonesty. United States v. Smith, supra. See also Government of Virgin Islands v. Toto, 529 F.2d 278 (3rd Cir. 1976); Government of Virgin Islands v. Testamark, 528 F.2d 742 (3rd Cir. 1976). In the context of credibility, all of these crimes are "honest" crimes, since they do not involve any sort of false statement or stealth, such as embezzlement or fraud.

It is this distinction between crimes which necessarily involve "dishonesty" and crimes which do not with which the court should concern itself in making the delicate balance between the probative value of the conviction and its prejudicial effect as required by Rule 609(a)(2), since the conviction is being offered only on the issue of the credibility of Petitioner's testimony. Judge O'Kelley never comes to grip with this issue, but instead rules on the "old" "pre-Federal Rules of Evidence" and speaks in terms of "moral turpitude". (R. Vol. II, p. 179). He fails, therefore, to make even this initial determination as to the probative value, if any, of the evidence. Since the required balancing of Rule 609(a)(1) was never performed by the trial court the motion to suppress was improperly denied.

Furthermore, Judge O'Kelley failed to deal with the potential prejudicial effect of the convictions. The judge not only ignored the great pains the Petitioner had gone to to prevent at least his bank robbery conviction from being brought out, by stipulating to his conviction (R. Vol. I, p. 10-12, 27-29, 86), but did not consider that the court's prior ruling denied Petitioner any other witnesses save himself.

Given Petitioner's stipulation, under this Court's decision in United States v. Spletzer, supra, it would have been reversible error for the trial court to have allowed the government to prove the bank robbery conviction. In Spletzer, the Court notes the serious prejudicial effect of a conviction such as bank robbery and holds that this unfair prejudicial effect substantially outweighed any value of the evidence.

In sum, Judge O'Kelley failed not only in not considering the limited probative value of the conviction, but also failed to properly weigh the prejudicial effect as required by Rule 609(a)(1). The decision of Judge O'Kelley in refusing to suppress the convictions substantially prejudiced Petitioner's rights in this case and therefore constituted reversible error.

IV. CHARGE WITH RESPECT TO CREDIBILITY OF WITNESSES.

In the portion of the trial judge's jury instructions concerning witnesses, the trial court states that in regard to determining the credibility of witnesses the jury should consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case". (R. Vol. II, p. 206). The Petitioner specifically excepted to this instruction on the basis that where Petitioner presents no evidence, "it places a burden upon the defendant to call witnesses to contradict and bolster (its case), and puts an

idea in the jury's mind that Petitioner should have called evidence to contradict what the government said or should have contradicted it in some way". (R. Vol. II, p. 212).

The language used by Judge O'Kelley is the same language as is included in the recommended instruction in Federal Jury Practice and Instructions, 3rd Ed. Devitt and Blackmar, Section 17.01. Such language might not be exceptional in a case in which Petitioner takes the stand or offers any evidence. However, as noted above, since Petitioner was effectively deprived of his right to testify in his own behalf and he was not allowed to call any witnesses, Petitioner was placed in a position where it was impossible for him to specifically "contradict" the government's witnesses. However, under the Fifth Amendment to the Constitution, Petitioner is not required to take the stand and specifically contradict the government's evidence, since Petitioner is presumed innocent and the government is required to prove Petitioner guilty beyond a reasonable doubt. An instruction telling the jury to consider the degree to which testimony is "supported or contradicted", has the same danger as the old "every witness is presumed to speak the truth" instruction which Devitt and Blackmar no longer include in Section 17.01. See Federal Jury Practice and Instructions, 3rd Ed. Section 17.01, Notes. See also Cupp v. Naughten, 411 U.S. 141, 94 S.Ct. 396 (1973). The danger is that the instruction places a burden on Petitioner to put on evidence to somehow "contradict" the government's witnesses. Petitioner is in fact compelled to testify, since by not "contradicting" the government witnesses, he runs the risk that in conformity with the trial court's instructions their testimony will be conferred with credibility.

Although admittedly in Cupp v. Naughten, supra, the "every witness speaks the truth" instruction was not held to constitute a constitutional violation under the Fourteenth Amendment, the "support or contradict" language in the charge given in this case did substantially affect Petitioner's rights and thus constituted reversible error. The Sixth Circuit has held subsequent to Cupp that the giving of the "speak the truth" instruction over timely objection is reversible error. United States v. Maselli, 534 F.2d 1197 (6th Cir. 1976). In the context of this case, where Petitioner presented no evidence, the giving of the "support or contradict" instruction was similarly erroneous and calls for a reversal.

V. DENIAL OF PETITIONER'S MOTION FOR MISTRIAL WHERE PETITIONER'S POST-TRIAL SILENCE WAS HIGH-LIGHTED.

Petitioner's post-arrest silence was high-lighted to the jury. (R. Vol. II, p. 144-145, 153, 189). The evidence came in when FBI Agent Harold J. Poe responded that Petitioner said "nothing" when the prosecutor asked him "what did he tell you?" (R. Vol. II, p. 144-145). Even after Petitioner's motion for mistrial, which was denied and the court's cautionary instruction (R. Vol. II, p. 145, 149-150), Poe persisted by further revealing Petitioner's decision not to talk to Poe about the matter. The prosecutor, in his closing argument, then recalled to the jury Petitioner's choice to remain silent when he said "nothing further happens that day". (R. Vol. II, p. 189).

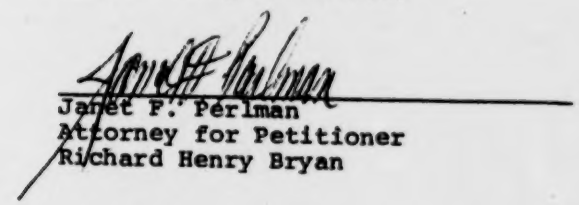
The analysis given to testimony concerning post-arrest silence depends upon an assessment of the probative value of the silence and the damage, which such testimony concerning his silence, does to a defendant's defense. The fact of Petitioner's silence, here, lacked any significant probative value. See United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133 (1975). The prejudicial impact of the silence testimony was great under the circumstances of this case, because Petitioner, who was denied presenting any witnesses on his duress defense and on the issue of intent, had succeeded in drawing the inference, during the cross-examination of Brenda Tomason, that in some manner Petitioner's escape was related to the problems at the Atlanta Penitentiary. (R. Vol. II, p. 99-101, 107, 110). The silence testimony was used in a manner which damaged the limited defense which Petitioner had succeeded in raising. United States v. Impson, 531 F.2d 274 (5th Cir. 1976). This evidence came in on the government's case-in-chief and was high-lighted by the prosecutor in his closing argument. (R. Vol. II, p. 189). Under these circumstances, bringing to light Petitioner's post-

arrest silence constituted reversible error.

CONCLUSION

For the above-mentioned reasons, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully Submitted,



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United States Court of Appeals

FOR THE FIFTH CIRCUIT

MAY 18 1979

U.S.D.C. — Atlanta

MAY 15 1979

BEN H. CARTER, Clerk
By:

October Term, 19

No. 78-5489

D. C. DOCKET NO. CR-78-32A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD HENRY BRYAN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the District Court in this cause be, and the same is hereby affirmed.

March 23, 1979

FILED IN CLERK'S OFFICE
AND A TRUE COPY CERTIFIED, THIS
MAY 16 1979
Ben H. Carter, Clerk
By: Janet L Reed
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Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By: Brenda Hauck
Deputy MAY 14 1979

UNITED STATES of America, Plaintiff-Appellee,

v.

Richard Henry BRYAN, Defendant-Appellant.

No. 78-5489.

United States Court of Appeals, Fifth Circuit.

March 23, 1979.

Defendant was convicted before the United States District Court for the Northern District of Georgia at Atlanta, William C. O'Kelley, J., of escape, and he appealed. The Court of Appeals held that defendant, who was in position of safety at hospital when he escaped, who was not faced with specific threat, forcible sexual attack or substantial bodily injury in immediate future, who had ample opportunity to complain, and who did not immediately report to authorities once he was out of reach of alleged dangers, could not rely on defense of duress or necessity.

Affirmed.

1. Escape ⇐6

Theory of defense of duress or necessity to charge of escape is that outside physical forces so powerfully influence a defendant that his actions cannot be considered voluntary; once he has attained position of safety, however, his actions can no longer be considered involuntary.

2. Escape ⇐6

Defendant, who was in position of safety at hospital when he escaped from custody of the Attorney General, who was not faced with specific threat, forcible sexual attack or substantial bodily injury in immediate future, who had ample opportunity at hospital to complain to authorities, who showed no history of having made unanswered complaints on prior occasions, and who did not immediately report to authorities once he was out of reach of alleged dangers but remained at large for six months before he was arrested and detained, could not rely on defense of duress or necessity. 18 U.S.C.A. § 751(a).

3. Witnesses ⇐337(5)

In prosecution for escape, it was within trial court's discretion to permit cross-examination as to past convictions for purpose of impeaching defendant, if he took the stand.

4. Criminal Law ⇐393(1)

Charge that jury should consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case" did not place burden on defendant to contradict Government's witnesses, and thus deprive him of his Fifth Amendment rights, but, rather, simply directed jury's attention to totality of the evidence. U.S.C.A.Const. Amend. 5.

5. Criminal Law ⇐393(1)

Where government agent testified that when he went to the jail after defendant's apprehension, defendant came to cell door when another name was called but said nothing, agent's response "Nothing" in answer to question "What did he tell you?" did not violate defendant's constitutional right to remain silent.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

Defendant appeals his jury conviction for escape from the custody of the Attorney General in violation of 18 U.S.C.A. § 751(a). While serving a 22-year sentence for bank robbery, defendant escaped from a hospital where he had been temporarily housed for medical treatment, after which he was to be returned to the Atlanta Federal Penitentiary.

Asserting duress or necessity as a defense, defendant claimed his escape was a direct result of his fear of being returned to the penitentiary where he allegedly had been and would be homosexually attacked by other inmates. Defendant argues the trial court erred when it: rejected that defense as a matter of law; refused to issue writs of habeas corpus ad testificandum to secure inmate witnesses to testify to assaults at the penitentiary; refused to prohibit disclosure of defendant's past convictions if he took the stand; charged the jury incorrectly regarding credibility of witnesses; and denied a mistrial when the prosecutor elicited a comment concerning defendant's post-arrest silence. Finding no merit in defendant's arguments, we affirm.

With the assistance of a hospital worker defendant fled from the hospital and remained at large for six months before he was arrested and detained in a county jail in connection with a murder. He was subsequently returned to federal authorities.

In response to the Government's motion to disallow defendant's proffered de ..nse of duress or necessity and to quash certain subpoenas, the district court ruled defendant's duress defense unavailable as a matter of law since defendant had absented himself from custody for a period of six months. The district court correctly relied on the reasoning in *United States v. Michelson*, 559 F.2d 567 (9th Cir. 1977), and quoted the following:

> [A]n escape will not be excused by reason of duress if the escapee fails to submit to proper authorities immediately after attaining a position of safety. The inmate's failure to submit to proper authorities following the allegedly coerced escape amounts to an unexcused commission of the crime of escape. Therefore, when an escapee fails to submit to proper authorities, the asserted duress defense must be rejected because as a matter of law it does not negate the continued absence from custody.

United States v. Michelson, supra at 570.

[1] The theory of such a defense is that outside physical forces so powerfully influence a defendant that his actions cannot be considered voluntary. Once he has attained a position of safety, however, his actions can no longer be considered involuntary.

Although defendant relies on the test set forth in *People v. Lovercamp*, 43 Cal. App.3d 823, 832, 118 Cal.Rptr. 110, 115 (1974), he even fails to comply with virtually all of the *Lovercamp* requirements. The court in *Lovercamp* ruled duress could constitute a defense where:

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
>
> (3) There is no time or opportunity to resort to the court;
>
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
>
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

[2] In this case, defendant was in a position of safety at the hospital when he escaped, he was not faced with a specific threat, forcible sexual attack or substantial bodily injury in the immediate future, he had ample opportunity at the hospital to complain to authorities and to petition the court, he showed no history of having made unanswered complaints on prior occasions to those authorities, and he did not immediately report to authorities once he was out of reach of the alleged dangers.

The other cases relied on by defendant are of no support to his duress argument. They involve substantially different facts and circumstances and do not apply here. *See, e. g., United States v. Bailey*, 190 U.S.App.D.C. 142, 585 F.2d 1087 (1978), *petition for cert. filed*, 47 U.S.L.W. 3437 (Dec. 18, 1978, No. 78-990); *United States v. Davis*, 546 F.2d 583 (5th Cir.), *cert. denied*, 431 U.S. 906, 97 S.Ct. 1701, 52 L.Ed.2d 391 (1977); *United States v. Harp*, 536 F.2d 601 (5th Cir. 1976); *United States v. Chapman*, 455 F.2d 746 (5th Cir. 1972).

The court correctly determined there was no factual basis for defendant to raise a duress or necessity defense.

This ruling controls the decision as to the district court's refusal to issue writs habeas corpus ad testificandum to secure the presence of inmate witnesses at trial. The prison conditions about which defendant's witnesses could testify, and his state of mind resulting therefrom, can be assumed, but defendant's failure to complain to authorities while he was in the hospital and his failure to contact authorities during the six-month period he was at large defeat his defense.

[3] Defendant had been previously convicted of escape, bank robbery, voluntary manslaughter, and murder. It was within the trial court's discretion to permit cross-examination as to defendant's past convictions for the purpose of impeachment, if defendant took the stand.

[4] The district court charged the jury, *inter alia*, to consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case." Defendant contends the charge placed a burden on defendant to contradict the Government's witnesses and deprived him of his Fifth Amendment rights. On review, we conclude the district court simply directed the jury's attention to the totality of the evidence in the case and committed no reversible error.

[5] Defendant contends the Government improperly commented on his post-arrest silence and deprived him of his constitutional right to remain silent. A Government agent testified that when he went to the jail after defendant's apprehension, defendant Bryan came to the cell door when the name Rodney B. Brown was called but said nothing. In this context, coupled with the district court's cautionary instruction, the response "Nothing" in answer to the question "What did he [defendant] tell you?" did not violate defendant's constitutional right to remain silent.

AFFIRMED.

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No. 78-6798

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RICHARD HENRY BRYAN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

PHILIP B. HEYMANN
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 591 F.2d 1161.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1979. A petition for rehearing was denied on May 4, 1979. The petition for a writ of certiorari was filed on June 6, 1979 and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's evidence of homosexual attacks, offered as a defense to an escape prosecution, was properly excluded where petitioner was in a position of safety when he escaped and remained in hiding following his escape.

2. Whether the trial court abused its discretion in ruling that evidence of petitioner's previous convictions were admissible to impeach his credibility should he elect to testify.

3. Whether the trial court's instruction to the jury to consider the extent to which the testimony of each witness was supported or contradicted by other evidence was proper.

4. Whether testimony by a federal agent that petitioner said nothing during two visits with the agent deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of escape from the custody of the Attorney General, in violation of 18 U.S.C. 751(a). Petitioner was sentenced to five years' imprisonment to run consecutively to a sentence previously imposed. The court of appeals affirmed.

1. The government's evidence showed that petitioner, who was serving a 22-year bank robbery sentence in the United States Penitentiary in Atlanta, was temporarily transferred to a hospital in Atlanta for medical treatment (Tr. 68, Pet. App. 2). On July 10, 1976, petitioner escaped from the hospital (Tr. 75-77, 90-95). Six months later, he was arrested by local police in Georgia on a murder warrant. He was transferred to federal custody and subsequently returned to the Atlanta penitentiary (Tr. 142, 153).

2. Prior to trial, petitioner requested writs of habeas corpus ad testificandum to obtain the testimony of other inmates from the penitentiary to support a duress defense. In an offer of proof, petitioner alleged that prior to his transfer to the hospital, he had been sexually assaulted by inmates on several occasions, that

prison officials were generally apathetic to such attacks, that when he complained to a guard no relief was provided, and that the only way he could avoid such attacks was to submit to administrative detention. He also claimed that resort to the courts would not have provided timely relief, and that at the time of his escape, he anticipated being returned to the Atlanta penitentiary (R. 66-72). The trial judge refused to issue the writs. Relying upon United States v. Michaelson, 559 F.2d 567 (9th Cir. 1977), he reasoned that the duress defense was unavailable because petitioner failed to surrender following his escape (R. 82-84).

Following presentation of the government's evidence, petitioner again sought to introduce evidence of homosexual assaults to support his defense that he did not entertain the requisite intent to escape, and to rebut evidence of intent presented by the government (Tr. 156-159). The trial court excluded the evidence (Tr. 159).

ARGUMENT

1. Petitioner contends that evidence of homosexual attacks at the penitentiary was admissible both to establish a duress defense and to demonstrate that he lacked the requisite intent to escape. The question whether such evidence is relevant in a prosecution for escape is pending before this Court in United States v. Bailey, cert. granted, No. 78-990 (March 19, 1979).

a. As we explain in our brief in United States v. Bailey, supra (Br. 21-34)[1/], duress can constitute a defense to prison escape, but its potential for abuse in this context has prompted courts to impose stringent limitations on its availability.

1/ "Br." refers to our brief in Bailey, supra. We are sending a copy of that brief to counsel for petitioner.

Specifically, the escapee must establish that:

> [He] is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
> (3) There is no time or opportunity to resort to the courts;
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

People v. Lovercamp, 43 Cal. App. 3d 823, 831-832, 118 Cal. Rptr. 110, 115 (1975). Accord, e.g., United States v. Boomer, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978).

Before this Court in Bailey is the question whether the return requirement is properly an element of a duress defense where, as here, petitioner is charged simply with escape from custody, rather than escaping and remaining at large. However, the court of appeals noted (Pet. App. 2-3) that petitioner's failure to fulfill virtually any of the other special requirements makes the defense unavailable to him regardless of the applicability of the return requirement. Thus, while the defendants in Bailey escaped from a confinement facility where they were allegedly subject to threats, assaults and cellblock fires (Br. 4-5),[2/] petitioner escaped while in a position of complete safety at a private hospital where he was safe from the alleged homosexual attacks. And, in contrast to

2/ In Bailey, we argue that the alleged threats and assaults and the history of alleged cellblock fires failed to fulfill the immediacy element of the duress defense because these incidents occurred several weeks before the escape (Br. 34-42).

several of the defendants in Bailey, who allegedly filed complaints with the prison administration or with the court while in jail (Br. 36-37 & n.24), petitioner sought no relief through established channels although he had ample opportunity to do so while in the hospital. Instead, he simply concluded that petitions to prison authorities would be unavailing or result in reprisals, and that efforts to obtain a judicial remedy would not result in timely relief.

b. On the other hand, the admissibility of evidence of homosexual assaults to demonstrate the absence of intent to escape is similar to the issue, presented in Bailey, whether escape under 18 U.S.C. 751(a) entails intent to avoid the normal incidents of confinement or intent "only to avoid conditions that are not normal aspects of confinement -- such as * * * homosexual attacks." United States v. Bailey, 585 F.2d 1087, 1093 n.17 (D.C. Cir. 1978). The majority of the court of appeals in Bailey reasoned that evidence that the defendant was subject to abnormal conditions is relevant to the question whether he escaped only to avoid such conditions or whether, in addition, the defendant also intended to avoid the confinement itself (ibid.).[3/]

3/ In Bailey the defendants were permitted to present evidence showing assaults, threats and cellblock fires, but the trial judge simply instructed the jury that escape is a "general intent" offense, and that a general intent involves only the "purpose to do something, the will to do the act" (Br. 8). The court of appeals there held that this instruction did not permit the jury to decide the factual question whether the defendants were motivated by the improper desire to avoid confinement conditions or the permissible desire to avoid abnormal conditions of confinement (Br. 11). In United States v. Cogdell, 585 F.2d 1130 (D.C. Cir. 1978), cert. granted, No. 78-990 (March 19, 1979)), a companion case, the same trial judge refused to permit the introduction of similar evidence. The court of appeals in that case held that, for the reasons set forth in Bailey, such exclusion was improper. 585 F.2d at 1132 & n.2.

But whatever the factual distinctions between this case and the Bailey cases, we think it appropriate that this Court defer a decision in this case until it decides Bailey. If Bailey is affirmed, the petition should be granted and the case remanded to the court of appeals for reconsideration in light of Bailey. If Bailey is reversed, the petition should either be denied, or granted and remanded for reconsideration, depending on whether the decision in Bailey leaves room for the consideration of the evidence that the trial court excluded here.

2. None of the other issues presented in the petition warrants review by this Court.

a. Petitioner contends (Pet. 14-16) that the trial judge prevented him from testifying in his own behalf by refusing to exclude evidence of his previous convictions to impeach his credibility.

Following the court's refusal to entertain the testimony of other witnesses concerning conditions at the Atlanta penitentiary, petitioner stated that he was considering whether to testify on his own behalf to explain that his escape was prompted by fears of recurring homosexual assaults (Tr. 172-175, 180). To assist in making this decision he inquired whether the prosecutor would introduce evidence of his previous convictions to impeach his credibility, and requested a ruling by the court whether such evidence would be admissible (Tr. 172). The prosecutor responded that he would offer evidence of a 1968 bank robbery conviction, a 1969 escape conviction, a 1970 premeditated murder conviction, and a 1976 voluntary manslaughter conviction. After hearing argument by both sides concerning the impeachment value and admissibility of these convictions (Tr. 173-178), the court ruled that they would be admitted for impeachment purposes (Tr. 178). Petitioner announced that, in view of this ruling, he would not testify (Tr. 180).

Petitioner contends that the court's ruling was in error because the convictions did not involve a false statement or dishonesty, and because the court did not specifically find that their probative value outweighed their prejudicial effect. But, as petitioner concedes (Pet. 14), Fed. R. Evid. 609(a)(1) authorizes admission of any felony conviction (including those involved here) for impeachment purposes if "the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." [4/] The court's resolution of this issue need not appear as an explicit finding on the record. The court's decision to admit the evidence, after it heard extended argument on the question (Tr. 174-178), demonstrates that it followed the balancing test required by Rule 609(a)(1). See United States v. Mahone, 537 F.2d 922, 928-929 (7th Cir.), cert. denied, 429 U.S. 1029 (1976). See also United States v. Hayes, 553 F.2d 824, 829 (2d Cir. 1977), cert. denied, 434 U.S. 867 (1978).

As the court of appeals concluded, the trial court's decision that the probative value of the convictions would outweigh their prejudicial effect was not an abuse of discretion. The two homicide convictions were recent, and "convictions have more probative value as they become more recent." United States v. Hayes, supra, 553 F.2d at 828, United States v. Mahone, supra, 537 F.2d at 922; 3 Weinstein's Evidence, ¶906[03] at 609-66 (1977). Additionally, the bank robbery and escape convictions were not so dated as to outweigh their probative effect on petitioner's credibility. See United States v. Wilson, 536 F.2d 883 (9th Cir.), cert. denied, 429 U.S. 902 (1976); 3 Weinstein's Evidence, supra, ¶609[03] at 609-75 n.9.

4/ All petitioner's prior convictions were within 10 years of the present trial and thus not subject to the more stringent admissibility test of Fed. R. Evid. 609(b).

b. Petitioner also contends (Pet. 16-18) that the trial court's instruction to the jury that, in determining the credibility of the witnesses, it should consider "the extent to which, if at all, each witness is either supported or contradicted by other evidence" (Tr. 206) impermissibly highlighted the fact that petitioner presented no evidence. As the court of appeals concluded (Pet. App. 4), the instruction simply admonished the jury to consider all the evidence in reaching a verdict. Contradictions can result from inconsistencies in the government's evidence no less than from inconsistencies between government and defense evidence, and thus the instruction did not necessarily or impermissibly invite the jury's attention to the fact that petitioner did not testify, nor did it impose on him the burden of presenting evidence. Hence, there is no merit to petitioner's argument that the instruction is comparable to the instruction that every witness is presumed to speak the truth when the latter instruction follows the defendant's election not to offer evidence. Compare Cupp v. Naughten, 414 U.S. 141, 145-146 (1973).

c. Petitioner's final contention (Pet. 18) is that the trial court should have granted a mistrial after an FBI agent testified concerning petitioner's post-arrest silence. The FBI agent, who first visited petitioner at the county jail following his arrest, testified that he had addressed the petitioner but that petitioner had said nothing in reply (Tr. 145). Following petitioner's objection and motion for a mistrial (Tr. 145), the trial judge advised the jury that the comment "shall not be taken to mean that the defendant did not make a statement, and [that the jury] should not draw any implication from that" (Tr. 150). Upon further questioning, the agent

testified that, on a subsequent occasion, he went to the cell, called petitioner, and informed him that he was taking him into custody as a federal fugitive. He again testified that petitioner said nothing at that time (Tr. 153).

The court of appeals properly held that, in this context, and given the trial court's cautionary instruction, the testimony did not violate petitioner's rights (Pet. App. 4). Nothing in the agent's testimony suggests that petitioner's silence was an exercise of his right against self-incrimination in the face of post-arrest interrogation (see Doyle v. Ohio, 426 U.S. 610, 618-619 (1976)); indeed there is no evidence that petitioner was interrogated by the agent on either occasion. Compare United States v. Hale, 422 U.S. 171, 176 (1975). Nor is there any possibility that this testimony impeded petitioner's ability to present a defense, as he now claims (Pet. 18). Compare United States v. Hale, supra, 422 U.S. at 176; United States v. Impson, 531 F.2d 274 (5th Cir. 1976). To the contrary, the duress defense proffered by petitioner was unavailable as a matter of law because of his inability to fulfill its requirements, and even if that defense had been available, his failure to make a spontaneous statement when called by the agent would not have damaged its credibility in the least.

Finally, contrary to petitioner's argument (Pet. 18), the prosecutor's remark during his summation that "nothing further happen[ed] that day" (Tr. 189) when the FBI agent first visited petitioner was not a comment upon petitioner's silence.[5/] It

5/ The prosecutor's statement was (Tr. 189):

> The next action sequence or point in the action is in December, on December 23rd, when Special Agent Poe is in the Murray County Jail and the defendant answers to the name Rodney Brown. Also, at this time, you will recall Mr. Poe testified that he happened to see the defendant's hands and each of the points on his hands had a scab right on the point of the hand. Nothing further happens that day.

was simply an allusion to the FBI agent's testimony that, during his first visit, nothing occurred after he addressed petitioner.

CONCLUSION

The Court should defer consideration of this petition pending the decision in United States v. Bailey, and should dispose of the petition in light of that decision. See page 6, supra.

Respectfully submitted.

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JULY 1979